DOCKET FILE COPY ORIGINAL

National Association of Regulatory Utility Commissioners

Incorporated

DENNIS J. NAGEL, *President*
Iowa Utilities Board
Lucas State Office Building
DesMoines, Iowa 50319

KEITH BISSELL, *First Vice President*
Tennessee Public Service Commission
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

ROSE MCKINNEY-JAMES, *Second Vice President*
Nevada Public Service Commission
4045 South Spencer Street
Suite A-44
Las Vegas, Nevada 89158-3920

1102 Interstate Commerce Commission Building
Constitution Avenue and Twelfth Street, N.W.
Washington, D. C. 20423

Mailing Address: Post Office Box 684
Washington, D. C. 20044-0684

Telephone: 202-898-2200
Facsimile: 202-898-2213

PAUL RODGERS
Administrative Director
General Counsel

GAILE ARGIRO
Treasurer

November 9, 1993

RECEIVED

NOV - 9 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 200554

RE: ERRATA

In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services

GEN Docket No. 93-252

Dear Sir:

The National Association of Regulatory Utility Commissioners ("NARUC") respectfully requests that the Commission grant whatever waivers that are necessary to allow NARUC to file this corrected version of its comments. NARUC's earlier filing inadvertently omitted the Table of Contents.

Please discard NARUC's November 8, 1993 filing.

Respectfully submitted,

JAMES BRADFORD RAMSAY
Deputy Assistant General Counsel

NARUC NUCLEAR WASTE PROGRAM
1071 National Press Building, 529 14th Street, N.W., Washington, D.C. 20045
Telephone: (202) 347-4314; Facsimile: (202) 347-4317

COMMITTEES OF THE ASSOCIATION FOR THE 1992-1993 YEAR

COMMITTEE ON ADMINISTRATION (1967)

James A. Burg,* South Dakota, *Chair*
William W. Redman, Jr.,* North Carolina, *Vice Chair*
James F. Munnelly,* Nebraska
Eric P. Serna, New Mexico SCC
James R. Monk, Indiana URC
Daniel G. Urwiller, Nebraska
Michael J. Kenney, Connecticut
Carmen J. Armenti, New Jersey
Edward J. Robertson, Ontario EB, Observer
Curt Hebert, Jr., Mississippi

COMMITTEE ON COMMUNICATIONS (1941)

Thomas M. Beard,* Florida, *Chair*
Dean J. (Joe) Miller, Idaho, *Vice Chair*
Sharon L. Nelson,* Washington
Bruce Hagen,* North Dakota
Lilo K. Schifter, Maryland
Andrew C. Barrett,* FCC
Susan M. Knowles,* Alaska
Louis R. Sherman,* Canadian RTC, Observer
Preston C. Shannon, Virginia
Marta Greytok,* Texas PUC
Dennis J. Nagel,* Iowa UB
Kenneth Gordon,* Massachusetts
Robert O. Wells, North Carolina
Margot Priest, Ontario TSC, Observer
Stephen O. Hewlett, Tennessee
Nancy M. Norling,* Delaware
David W. Rolka, Pennsylvania
James J. Malachowski, Rhode Island
Line Rochon, Quebec TB, Observer
Charles B. Martin, Alabama
Laska Schoenfelder, South Dakota
G. Richard Klein, Indiana
Kenneth McClure,* Missouri PSC
Howard C. Davenport, District of Columbia
Jolynn Barry Butler, Ohio
Norman D. Shumway,* California
Jean-Marc Demers, Quebec TB, Observer
Cheryl L. Parrino,* Wisconsin
Edward H. Salmon, New Jersey
Lisa Rosenblum, New York PSC

COMMITTEE ON ELECTRICITY (1953)

Ashley C. Brown,* Ohio, *Chair*
Ronald E. Russell, Michigan, *Vice Chair*
Robert A. Robertson, Nova Scotia, Observer
Kenneth D. Stofferahn, South Dakota
James M. Byrne, Utah
Patricia S. Qualls,* Arkansas
Richard D. Casad, Washington
Vicky A. Bailey,* Indiana
John H. Arnesen, REA, Observer
Deborah L. Louison, DOE, Observer
Otis D. Casto, West Virginia
Elizabeth Paine, Maine
Michael A. Pitlock, Nevada
Kevin Kelly, DOE, Observer
John T. Coughlin, Wisconsin PSC
Lynn Shishido-Topel, Illinois
Patricia M. Eckert, California
Wendell F. Holland, Pennsylvania
James T. McFarland, New York PSC
J.C. Watts, Jr., Oklahoma
Julius A. Wright, North Carolina
Judith C. Allan, Ontario EB, Observer
Warren D. Arthur, IV, South Carolina
Emmit J. George, Jr., Iowa UB
Robert Gee, Texas PUC
Marsha H. Smith, Idaho
Evan W. Woollacott, Connecticut
Susan F. Clark, Florida
James Sullivan, Alabama
Donald A. Storm, Minnesota PUC

COMMITTEE ON ENERGY CONSERVATION (1984)

Ron Eachus,* Oregon, *Chair*
Richard H. Cowart,* Vermont, *Vice Chair*
Allan G. Mueller, Missouri
Renz D. Jennings,* Arizona
Cynthia A. Kitlinski, Minnesota PUC
Carl A. Wolf, Jr., Ontario EB, Observer
Donald D. Phillips, Delaware
George E. Overbey, Jr., Kentucky PSC
Daniel Patrick O'Tierney, Alaska
Edward M. Meyers, District of Columbia
William D. Cotter, New York PSC
Mac Barber, Georgia
Bob Anderson, Montana
Steve Ellenbecker, Wyoming
Mary M. McInerny, New Mexico PSC
Craig A. Glazer, Ohio
Allyson K. Duncan, North Carolina
Leonard U. Wilson, Vermont
William M. Nugent, Maine
Christine E.M. Alvarez, Colorado
Hullihen W. Moore, Virginia
Douglas L. Patch, New Hampshire
Scott A. Neitzel, Wisconsin
Karl A. McDermott, Illinois
Karl A. Rabago, Texas PUC
John F. Mendoza, Nevada

COMMITTEE ON FINANCE AND TECHNOLOGY (1985)

Bil Tucker,* Wyoming, *Chair*
Orville J. Cook, Ontario EB, Observer
Marcia G. Weeks, Arizona
Joseph Rhodes, Jr., Pennsylvania
Ralph Nelson, Idaho
Sam I. Bratton, Jr., Arkansas
Edmund R. Skelcher, Ontario TSC, Observer
Lawrence B. Ingram, New Mexico PSC
J. Terry Deason, Florida
Richard M. Fanelly, Ohio
Mark A. Foster, Alaska
Stephen C. Hewlett, Utah
Duncan E. Kincheloe, Missouri
Suzanne D. Rude, Vermont
Thomas M. Benedict, Connecticut
Tom Burton, Minnesota PUC

COMMITTEE ON GAS (1963)

Bruce B. Ellsworth,* New Hampshire, *Chair*
Ruth K. Kretschmer, Illinois, *Vice Chair*
Frank O. Heintz, Maryland
John R. Smyth, Wyoming
Joshua M. Twilley, Delaware
Leo M. Reinbold, North Dakota
Roland Priddle, Canada, Observer
Frederick L. Corban, Indiana
S. Peter Bickley, New Mexico PSC
A.J. Pardini, Washington
Steven M. Fetter,* Michigan
Nancy Shimanek Boyd, Iowa UB
Henry G. Yonce,* South Carolina
Peter Bradford,* New York PSC
Bob Anthony, Oklahoma
Julius D. Kearney, Arkansas
Robert A. Rowan, Georgia
Jo Ann P. Kelly, Nevada
C. William W. Darling, Ontario EB, Observer
Laurence A. Cobb, North Carolina
Richard D. Frum, West Virginia
Keith Bissell,* Tennessee
Joan H. Smith, Oregon
Barbara Kates-Garnick, Massachusetts
Walter T. Kelly, Minnesota OPS, Observer
Patricia D. Perkins, Missouri PSC
J. Michael Biddison, Ohio
Rachel C. Lipman, Kansas
Robert-Paul Chauvelot, Quebec GB, Observer
Norman E. MacMurchy, Alberta PMC, Observer
Daniel Wm. Fessler, California

COMMITTEE ON TRANSPORTATION (1983)

Rose McKinney-James,* Nevada, *Chair*
Claude M. Ligon, Maryland
Frank D. Cochran, Tennessee
R. Henry Spalding, Kentucky RC
William A. Bailey, Kentucky RC
Stephen T. Walker, Missouri DOT
Cecil A. Bowers, South Carolina
Jerome D. Block, New Mexico SCC
Louis E. Gallegos, New Mexico SCC
Frank E. Landis, Jr., Nebraska
Joseph Jacob Simmons, III,* ICC
Gail C. McDonald, ICC
Jim Robinson, Kansas

COMMITTEE ON WATER (1967)

Linda Bisson Stevens,* New Hampshire, *Chair*
David L. Rauch, Missouri, *Vice Chair*
Paul G. Foran, Illinois
Dale H. Morgan, Arizona
Richard G. Patterson, Connecticut
Charles H. Hughes, North Carolina
Robert M. Davis, Kentucky PSC
David E. Ziegner, Indiana
Jeremiah F. O'Connor, New Jersey
Lila M. Sapinsley, Rhode Island
Henry G. Williams, New York PSC
Jan Cook, Alabama
Mary Clark Webster, Massachusetts
Luis Julian Lauredo, Florida
Galen D. Denio, Nevada
Thomas M. Dorman, Kentucky PSC
David S. Williams, Illinois
Betty Easley, Florida

*Member of the Executive Committee of the Association

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Sections 3(n) and 332 of the Communications Act	GEN Docket No. 93-252
Regulatory Treatment of Mobile Services	

INITIAL COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

PAUL RODGERS
General Counsel

CHARLES D. GRAY
Assistant General Counsel

JAMES BRADFORD RAMSAY
Deputy Assistant General Counsel

National Association of
Regulatory Utility Commissioners

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

(202) 898-2200

November 8, 1993

In the Matter of

Implementation of Sections 3(n) and 332 of the Communications Act
Regulatory Treatment of Mobile Services

GEN Docket No. 93-252

TABLE OF CONTENTS

TABLE OF CONTENTS

(CONTINUED)

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Sections 3(n) and 332 of the Communications Act	**GEN Docket No. 93-252**
Regulatory Treatment of Mobile Services	

INITIAL COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to Sections 1.49, 1.415, and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. §§ 1.49, 1.415, and 1.419 (1993), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following comments addressing the Commission's "Notice of Proposed Rulemaking" ("NPRM"), adopted September 23, 1993, and released October 8, 1993, [FCC 93-454] in the above-captioned proceeding:

I. INTEREST OF NARUC

NARUC is a quasi-governmental nonprofit organization founded in 1889. Its members include the governmental bodies engaged in the regulation of carriers and utilities from all fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands. NARUC's mission is to improve the quality and effectiveness of public utility regulation in America.

NARUC members include State and territorial officials charged with the duty of regulating the communications common carriers operating within their respective borders. These officials have the obligation to assure that communications services and facilities required by the public convenience and necessity are established and that service is furnished at just and reasonable rates.

In this proceeding, the FCC has raised for comment issues concerning the conditions under which States may continue to regulate the rates of various wireless carriers and services. Clearly, such issues are of direct concern to NARUC's State commission membership. The FCC's ultimate determinations on these issues will establish limits on the exercise of State regulatory oversight of current and emerging mobile wireless services.

II. BACKGROUND

On June 14, 1990, the FCC adopted a Notice of Inquiry commencing a broad investigation into the development of new personal communications services ("PCSs") in GEN Docket 90-314, such as advanced cordless telephones and portable radio systems for personal use. The FCC sought information to assist in the development of regulatory policies concerning the implementation of such services. NARUC participated at each stage of those proceedings. Subsequently, on August 10, 1993, President Clinton signed into law Title VI, § 6002(b) of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

That Section amends § 3(n) and § 332 of the Communications Act of 1934 ("Act"), to create a comprehensive framework for the regulation of mobile radio services, including existing common carrier mobile services, private land mobile services, and future services such as PCS. Under revised § 332, which previously governed private land mobile service, mobile services are classified as either "commercial mobile service" ("Commercial MS") or "private mobile service" ("Private MS"). Commercial MS providers are treated as common carriers under the Act, except that the FCC may exempt them from provisions of Title II - other than §§ 201, 202, and 208. Private MS are not subject to any common carrier regulation.

Section 332(c)(3) PREEMPTS STATE and local RATE AND ENTRY REGULATION of both commercial and private mobile service, but ALLOWS States to regulate OTHER TERMS AND CONDITIONS of commercial mobile service. In addition, under that section, States may petition for authority to regulate commercial MS rates under the conditions specified.

In the Budget Act, Congress directed the FCC to address several issues. Specifically, Congress required the FCC to complete a rulemaking by early April 1994 implementing § 332 as it affects the licensing of PCS.

That rulemaking must include a determination of (i) the state of competition among commercial MS and (ii) the extent of Title II regulation that will be imposed on PCS.

In addition, the FCC must issue rules by October 1994 implementing the "regulatory treatment" provisions of the Budget Act, including required modifications of the private land mobile rules and regulations insuring that all common carrier-like services are subject to comparable technical requirements.

In partial response to the Congressional directives, the FCC issued the instant NPRM seeking comment on proposals that (1) address definitional issues specified in the Budget Act, (2) identify various services, including PCS, affected by the new legislation, (3) describe the potential regulatory treatment of those services, and (4) delineate the provisions of Title II the FCC expects to apply to commercial MS, as well as, those provisions the FCC will not apply, and (4) establish procedures for States to continue, or reimpose, rate regulation of commercial MS.

III. DISCUSSION

A. To effectuate Congressional intent, the FCC should interpret § 332 to assure that (i) States that demonstrate that commercial MS has become a substitute for landline service in "the substantial portion of...exchange service within such state" should not also have to demonstrate market impact, (ii) any criteria adopted to screen state requests for rate authority should not be exclusive/exhaustive - a State's ability to demonstrate the impact of developing market conditions should not be limited, and (iii) the FCC should select the maximum period acceptable under the statute as the "reasonable time" that must pass before petitions to remove State rate authority can be filed.

In Section E.(3.) of the NPRM, ¶ 79, mimeo at 29, the FCC examines the procedures established in the statute for States to either reassert or extent rate regulation authority.

Revised § 332 preempts State rate and entry regulation of all commercial MS. However, § 332(c)(3)(B) specifies that any State that has rate regulation in effect for a commercial MS as of June 1993 may, prior to August 10, 1994, petition the FCC to extend that authority based upon two listed criteria. States may also seek to initiate rate regulation based on the same criteria. If the FCC authorizes State rate regulation under either procedure, interested parties may, after a "reasonable time," petition the FCC to suspend the regulation. Section 332(c)(3)(B) enumerates the criteria the FCC must use to screen State petitions to continue or reassert rate authority. However, the plain text of the statute contains an ambiguity. Specifically, this section, by using the disjunctive "or", establishes two "tests" for the FCC's consideration. States must show either that -

(1) "...market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates...or

(2) such market conditions exist and such service is a replacement for a substantial portion of the telephone land line exchange service within such state.."

The statutory language, if read literally, makes the second criteria superfluous. That is - IF a State meets the first statutory test and establishes that market conditions fail to protect subscribers, THEN there is no need ever to met the arguably more burdensome criteria of the second test - that market conditions exist AND such service is a replacement for land line exchange service.

It is well established that when such ambiguities arise on the face of the statute, one resorts to the legislative history for clarification.[1] Accordingly, the House Conference report is a useful starting point for examining this issue. See, **House Conference Report No. 103-213**, 103rd Congress, 1st Sess. (1993) at pages 490-491 [**U.S. Cong.& Admin. News**, 103rd Congress, Pamphlet No. 7A, September 1993, at page 1181-2] ("Conference Report").

According to the Conference Report, States may petition for authority to regulate rates "..where mobile services have become a substitute for telephone service, or where market conditions are such that consumers are not protected from unreasonable...rates." Id. at 1181. Thus, the original House language established two tests to support continuation/imposition of State rate authority: (1) where mobile services have become a substitute for land line service, OR (2) where market conditions do not protect consumers. The Senate did amend this section, BUT both the amendment and the language of the Conference report clearly demonstrate that amendment did not, and was not designed to, eliminate either test, but only to modify the second test so that it would apply only when services become a substitute for land line service "for a substantial portion of the communications within such state (rather than substantial portion of the public)." Id. at 1182.

---

[1] See generally, Bonham v. D.C. Library Administration, 989 F.2d. 1242 (D.C.Cir. 1993); U.S. v. Fairman, 947 F.2d 1479, cert. denied, 112 S.Ct. 1504 (1991); Alcare Home Health Services, Inc. v. Sullivan, 891 F.2d 850 (11th Cir. 1990); Calbalceta v. Standard Fruit Co., 883 F.2d 1553 (11th Cir. 1989); City of New York v. U.S. Dept. of Treasury, 700 F.Supp 490 (E.D.Pa 1988).

Accordingly, NARUC suggests that the second test should be read in a manner that fulfills Congressional intent, i.e., States that can demonstrate that commercial mobile services have become a substitute for land line service in "the substantial portion of the telephone land line exchange service within such state" should not also have to demonstrate market impact.

Because of the timing of the enactment of the Budget Act and the issuance of this NPRM, NARUC has not had an opportunity to formally consider what other procedures and criteria should be adopted to screen State requests for rate authority. However, whatever "criteria" the FCC incorporates into its rules, NARUC respectfully suggests the posed criteria not be exclusive or exhaustive. Thus, a State's ability to demonstrate imminent harm to the consumer posed by developing market conditions should not be limited by whatever criteria the FCC adopts. Congress explicitly included this State "safety valve" to assure that consumers in the various States are protected from unreasonable rates. NARUC suggests the salutary prophylactic impact intended is best effectuated by not limiting a States' ability to demonstrate that consumers are, or will be, harmed by limiting the method of proving that impact to certain listed criteria.

In addition, when determining the "reasonable time" after which an "interested party" can petition for removal of State rate oversight, and the procedures for such requests, NARUC respectfully requests the FCC consider the obvious ability of the rate regulated carrier to "game" the system at federal and state taxpayer expense.

The obvious incentives for such activity, particularly when viewed in conjunction with (i) the States' historical reluctance to impose regulation on wireless carriers unless absolutely required to protect the consuming public, (ii) the obvious need for some period of time for the particular State's regulations to take effect, (iii) the nine month regulatory lag built into the statute that prevents a State from even beginning efforts to protect consumers even where the FCC ultimately agrees that consumers are being harmed - suggests that the FCC should establish as the "reasonable time" the maximum period acceptable under the statute.

B. The amendments to § 332 clarify that "mobile services" includes PCS and private land mobile services.

Amended § 332 governs the regulation of all "mobile services" as defined in § 3(n) of the Act. In this proceeding, the FCC is seeking comment on how this and related terms should be interpreted. In all of NARUC's past resolutions, NARUC has consistently supported designating PCS and similar services as common carrier services. To receive common carrier treatment under the new statutory scheme, such services must first be "mobile services."

In ¶ 9 of the NPRM, mimeo at 3, the FCC suggests that the amendment to § 3(n) does not appear to substantively change the Act's prior definition of "mobile service." Instead,

> "...the amendment simply clarifies that private land mobile services and personal communications services are to be included within the general category of mobile services for purposes of regulation under § 332. We tentatively conclude that the statutory definition is intended to bring all existing mobile services within the ambit of Section 332."

NARUC generally agrees with the FCC's approach in this paragraph as it seems to be a necessary prerequisite to fulfilling the regulatory parity goals established elsewhere in the legislation.

C. All PCS should be designated commercial mobile services.

In ¶ 44, NPRM, mimeo at 17, the FCC examines the regulatory classification to be applied to PCS specifically requesting "..comment on whether PCS should be uniformly treated as a commercial mobile service...or whether there are also potential applications of PCS that would constitute private mobile service under the statutory definition."

Ever since the FCC's original PCS Notice of Inquiry,[2] the FCC has consistently discussed PCS as including a broad range of radio services that free individuals from the wireline public switched telephone network and enable communications away from home or office telephones. Basic forms of these services include the current cordless telephone and paging devices. Car telephone services represent a more advanced form of such services. Even more advanced forms of PCSs include the hand-held portable [cellular/microcellular] phones that allow individuals to call or be called any time they are within a cellular service area.

---

[2] **In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services,** GEN Docket No. 90-314, FCC 90-232, (Released June 28, 1990).

NARUC respectfully suggests that most, if not all, PCS proposals appear to clearly fall within the Budget Act's definition of commercial MS. Ever since the November 15, 1990 passage of its first PCS resolution, [3] NARUC has consistently argued that all PSC "should be regulated as common carriers." Even the FCC has acknowledged that:

> As a practical matter, we expect that most broadband and many narrowband PCS services will involve interconnected service to the public or large segments of the public. We believe that a primary objective of Congress in revising Section 332 was to ensure that such services would be regulated as commercial mobile services. NPRM, ¶ 45, mimeo at 17.{Emphasis Added}

Since the bulk of the services described so far in the various FCC PSC orders are designed to complement, if not replace, services (i) currently offered by local exchange carriers, and (ii) considered, pre-Budget Act, as wireless common carrier offerings, the same type of common carrier regulations should continue to apply to these like services. Accordingly, NARUC supports classifying all PCS as commercial MS to assure common carrier status and treatment.

---

[3] **Resolution Concerning the FCC Rules to Establish New Personal Communications Services,** Adopted November 15, 1991, NARUC Bulletin No. 47-1990 at 10-11.

D. Alternatively, should the FCC promulgate regulations that allow self selection of regulatory status by PCS providers, NARUC respectfully suggests the FCC must establish filing, and follow-up reporting requirements that provide sufficient data to enable the FCC to fulfill its statutory duty to independently assess the applications and assure the service proposed/provided actually qualifies as a private MS.

Although, as discussed, supra, the FCC has acknowledged that most PCS will qualify as commercial MS, in ¶ 45, NPRM, mimeo at 17, the FCC "tentatively concludes that no single regulatory classification should be applied to all PCS services," as such services "...could include applications that are not interconnected to the public switched network or are not offered to a substantial portion of the public." If the FCC adheres to this tentative conclusion, it has proposed to allow all PCS licensees to choose whether to provide commercial MS or private MS, as defined in § 332, regardless of frequency assignment. Id.. at ¶ 46.

If the FCC adopts this alternative proposal, NARUC respectfully suggests the FCC must establish filing, and follow-up reporting requirements that provide sufficient data to enable the Commission to fulfill its statutory duty to independently assess the applications and assure the service proposed/provided actually qualifies as a private MS.

E. The FCC and State regulators should work together to develop methods for service monitoring.

Regardless of the method of service monitoring/reporting requirements ultimately implemented, the FCC and States should (i) work together to develop methods for, and (ii) provide complete reciprocal access to information relevant to - service monitoring.

Even without rate and entry authority, States still retain authority over all other aspects commercial MS. States will also need data to determine if the statutory conditions for reimposition/continuance of State rate regulation are, or remain, in existence. Federal/State sharing will bolster monitoring efforts and will help assure that prophylactic/quality assurance effects will be realized.

F. At a minimum, ESMR providers, "store and forward" paging, and existing common carriers must be designated as commercial MS under the statute.

The NPRM also requires the FCC to examine the regulatory status of all existing mobile services under the new statutory definitions. NARUC respectfully suggests that, at a minimum, the so-called enhanced specialized mobile radio providers, "store and forward" paging services, and existing common carriers must be designated as commercial MS under the statute.

As for paging, as the NPRM, essentially acknowledges in footnotes 3 and 54, mimeo at 1 & 15,

> "[I]t appears that Congress contemplated that...private paging services would become commercial mobile services. Section 6002(c)(2)(B) of the Budget Act specifically grandfathers existing private paging services as private mobile services for three years after enactment."

NARUC agrees. Moreover, as discussed, infra, at 14, it appears that the FCC's prior treatment of so-called enhanced specialized mobile radio operators like Fleet Call instigated a major portion of this legislation. See, e.g., House Report No. 103-111, 103rd Congress, 1st Sess. (1993) at 260, citing the FCC's treatment of Fleet Call in connection with a statement that

"[f]unctionally, these "private" carriers have become indistinguishable from common carriers" As allowing such private land mobile carriers to operate under inconsistent regulatory schemes could "..impede the continued growth and development of commercial mobile services...", Id. NARUC suggests that these services also must be classified as commercial MS.

NARUC also agrees with the NPRM statement, ¶ 41, mimeo at 15, that "existing common carrier mobile services that provide interconnected...service to the public (e.g., cellular) [must] generally be classified as" commercial MS.

In addition, the FCC's suggestion in ¶ 41 that some "common carrier mobile services" could be reclassified as private mobile services is, by definition, inconsistent with the statute. The Budget Act notes that commercial MS includes the functional equivalent of "common carrier mobile services." Indeed, the FCC admits in the accompanying footnote that Congress explicitly provided for a transitional period from private to commercial MS for only example posed - "store-and-forward" paging services.

G. To comply with the statutory objectives, the terms "for profit" and "interconnection" must be broadly construed to include, inter alia, (i) providers that purport to sell the "interconnected" portion of service on a non-profit basis, (ii) services available to a large sector of the public regardless of eligibility limitations, and (iii) services offered via individual negotiations.

Section 332(d)(1) provides that a mobile service will be classified as a commercial MS if it meets two criteria: the service (1) is "provided for profit," and (2) makes "interconnected service" available "to the public" or "to such classes of eligible

users as to be effectively available to a substantial portion of the public. "Interconnected service," in turn, is defined in § 332(d)(2) as "service that is interconnected with the public switched network" or service for which an interconnection request is pending under § 332(c)(1)(B). According to the NPRM, the "for profit" criteria will apparently assure that:

> government and non-profit public safety services..[are].. outside the..commercial mobile service definition. Similarly, businesses that operate mobile..systems solely for their own private, internal use would not be considered to be providing mobile radio services...for profit. NPRM, ¶ 11, mimeo at 3.

In addition, the NPRM, at ¶ 12, mimeo at 4, suggests that some Part 90 providers might be classified as a "for-profit" service even if it contended that the "interconnected" portion of their services are being offered on a non-profit basis. NARUC suggests that the FCC must adopt this ¶ 12 proposal to be in accord with Congressional intent. Indeed, as mentioned, supra, it appears that portions of this legislation had its genesis in the FCC's prior treatment of enhanced SMR services like Fleet Call - a company that could continue to argue that they are not, technically, selling "interconnected" service for a profit.[4] Accordingly, NARUC

---

[4] See, e.g., **House Report No. 103-111**, 103rd Congress, 1st Sess. (1993) at page 260, note 3 and accompanying text [**U.S. Cong.& Admin. News**, Pamphlet 7, September 1993, at 587], citing the Fleet Call order and noting that "[f]unctionally, these "private" carriers..[are]..indistinguishable from common carriers.. but private land mobile carriers are subject to inconsistent regulatory schemes;..disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services." See, **Memorandum Opinion and Order, In re Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets**, 6 FCC Rcd 1533, recon. denied, 6 FCC Rcd 6989 (1991).

respectfully suggests that the "for-profit" test suggested by the FCC in ¶ 12 should control under the stated circumstances.

For similar reasons, it appears that any licensees that operate a system for internal use but also make excess capacity available for-profit should also fall under commercial MS rubric. Such licensees explicitly fall within the broad "for profit" language of the statute. However, even if one assumes that is not the case, categorizing such operations as non-profit poses significant opportunities for abuse of and/or circumvention of the statutory scheme.[5]

The NPRM also asks for comment on the desirability of regulating as a commercial MS, the third party "for profit" manager of a shared system. As the manager is, by definition, providing the service "for profit", it is difficult to see how such systems can avoid the commercial classification. At a minimum, the FCC must adopt rules that assure that operators do not use this "exception" to circumvent the Budget Acts' goal of establishing regulatory parity.[6]

In ¶ 14, of the NPRM, mimeo at 5, the FCC takes up the question of an appropriate definition for commercial MS

---

[5] The FCC suggests allowing the licensee to provide both private and for-profit service under the same license. Because of the obvious problems associated with, inter alia, enforcing, in any meaningful fashion, any relevant restrictions on the "commercial" service offered under such a scheme, this approach creates a clear incentive for operators to game the regulatory structure and claim nonprofit status, provide a de minimis "non-profit" service, etc.

[6] For example, in some "shared systems", the real offeror of the service may be the manager and the "sharers" are just the users of the manager's service.

"interconnected service." Later in the NPRM, ¶ 18, mimeo at 6, the FCC suggests that guidance on the meaning of interconnection can be obtained from International Satellite Systems, Report and Order, Establishment of Satellite Systems Providing International Communications, CC Docket 84-1299,101 FCC 2d 1046 (1985), recon., Memorandum Opinion and Order, 61 Rad. Reg. 2d (P&I7) 649 (1986), further recon., 1 FCC Rcd 439. In that proceeding, the FCC suggested that interconnection includes "direct" and "indirect" links "..with any public switched message network", including interconnection through a private branch exchange, by the manual interconnection of a switchboard operator, or via store and forward technology.

The FCC also noted that, under current regulations, Part 22 providers are co-carriers to local exchange companies because they are generally engaged in the provision of local, intrastate, exchange telephone service.

The general approach to interconnection established in these two instances comports with Congressional intent to extend common carrier regulation to service providing the functional equivalent of common carrier services.

Accordingly, it seems clear that a carrier that interconnects with a commercial MS provider also necessarily offers interconnected service because its messages would be transmitted between its system and the rest of the public switched network. Moreover, under the Intelsat rationale described above, "store-and-forward" is also a form of interconnected service because the

customer can receive a message from any subscriber to the public switched network. Indeed, as the FCC notes elsewhere in the NPRM, "it appears that Congress contemplated that some private paging services would become commercial mobile services...the Budget Act specifically grandfathers existing private paging services as private mobile services for three years after enactment." [7]

The statutory definition of commercial MS requires that interconnected service be made available "to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public." Obviously, any interconnected services offered to the public without restriction, e.g., current common carrier services, are included.

NARUC also generally agrees with the FCC (1) determination that the statutory "reference to 'classes of eligible users,' ...other provisions...and legislative history, make clear that Congress intended to include some existing private services within...its [commercial MS] definition even if they are not offered to the general public without restriction", {Emphasis Added} (2) suggestion that services are "effectively available" regardless of eligibility limitations if they are available "to a large sector of the public," and (3) suggestion that service is offered to the public within the meaning of § 332(d)(1) regardless of whether it is offered indiscriminately or through individualized negotiation.

---

[7] Cf. House Report at 587, which cites, in the course of discussing services that are functionally equivalent to common carriage, an FCC rulemaking dealing with private carrier paging.

H. Private MS does not include any mobile service that (1) fits the definition of a commercial MS, or (2) is the functional equivalent of a commercial MS.

Section 332(d)(3) defines private MS as any mobile service that is not a commercial MS or the "functional equivalent" of a commercial MS. The reference to "functional equivalence" was added to the legislation in conference. The Conference Report states that the language was amended to make clear that the term "private mobile service" "includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service, as specified by [FCC] regulation." Conference Report at 496.

In ¶ 29 of the NPRM, mimeo at 10, the FCC suggests that more than one interpretation of this language is possible. According to the FCC, under one permissible interpretation, "..a service that fell within the literal definition of a commercial mobile service could nonetheless be classified as private if we determined that it was not functionally equivalent."

NARUC respectfully suggests that the clear language of the statute augers otherwise. The elements of the definition of commercial MS/common carriage referenced in the statute are the sine qua non of common carrier service under the Act. A review of the text and legislative history of the Budget Act suggests that the "functional equivalence" language was added to expand the coverage of common carrier status to carriers that might not otherwise qualify as such. The proposed expansion of the private carrier definition suggested by the FCC would have the exact opposite effect.

Clearly, the version of this language provided in ¶ 31 of the NPRM, mimeo at 11, should control. There the FCC notes that a second permissible interpretation is that:

> "...private mobile service does not include any mobile service that (1) fits the definition of a commercial mobile service, or (2) is the functional equivalent of a commercial mobile service. Under this alternative interpretation, a mobile service that did not squarely meet the statutory test for a commercial mobile service could still be classified as a commercial mobile service if we determined that it was a "functional equivalent. "

As the FCC noted, the Conference Report supports this interpretation as it states that the Conference Committee amended the definition of private MS to "make clear that the term includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service." We also agree with FCC's statement that this approach comports with the view that functionally similar services should be subject to the same regulatory requirements.

I. As part of any determination of whether a particular service is the functional equivalent of commercial MS, it is appropriate to consider, inter alia, the nature of the service and other's [including customers'] perception of that service as equivalent to a commercial MS offering.

In ¶ 33 of the NPRM, mimeo at 12, the Commission raises for comment what factors should be examined to determine if a particular service is the functional equivalent of common carrier services. As NARUC has argued in other proceedings,[8] in making this determination, the FCC should require detailed and specific descriptions/data specifying the nature and conditions of the

---

[8] See, generally, NARUC's "APPLICATION FOR REVIEW OF PRIVATE RADIO BUREAU LETTER 7320-12" filed April 10, 1992, **In the Matter of Mobile Radio New England's Request for Waiver**, FCC File No. LMK-91260.

service and consider, inter alia, nature of the service provided and interested parties' [including customers'] perceptions of the functional equivalency of those services. As acknowledged in ¶ 33, NPRM, mimeo at 233, that it has previously used a similar approach "to determine whether a common carrier unreasonably discriminated in its charges for like communication services."

J. Preemption of State intrastate interconnection policies is inappropriate.

In ¶ 71, NPRM, mimeo at 26, the FCC "tentatively conclude[s]", that in the commercial mobile context, (i) "..LEC provision of interstate and intrastate interconnection and the type of interconnection the LEC provides are inseverable...", and that (ii) "...permitting state regulation of the right to interconnect and the type of interconnection for intrastate service would negate the important federal purpose of ensuring interconnection to the interstate network." In support of its conclusions, the FCC cites to its earlier preemption of State-imposed inconsistent cellular interconnection arrangements.

In this context, the FCC proposes preempting State (1) regulation of the right to intrastate interconnection and the right to specify the type of interconnection provided to mobile carriers,[9] and (ii) rate regulation of interconnection provided by commercial mobile service providers to other carriers.

---

[9] The FCC did correctly acknowledge that the underlying costs of interconnection provided to mobile service providers are severable and preemption in those circumstances are not appropriate. Id., at ¶ 70.